Supreme Court, U.S.
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No. 91-1519

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VINCENT F. COSTELLO,

Petitioner,

-against-

THOMAS A. McENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 20, 1992.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Where a public employee claims that he has been improperly transferred from a government position because he criticized certain agency policies and procedures, but where he also concedes that his First Amendment right to articulate such criticisms has in no way been "chilled" by the transfer, does the allegation of interference with the exercise of First Amendment rights in the workplace establish irreparable injury per se for injunctive purposes, thereby requiring temporary reinstatement of the employee to his former position pending trial of the underlying issues?

2. At a hearing on a motion seeking preliminary injunctive relief, is it proper for a Court to conclude that irreparable injury has not been demonstrated, where the evidence presented is inadequate to establish that the plaintiff's fellow employees have been "chilled" in the exercise of their First

Amendment rights, much less that temporary reinstatement would abate any such effect, if it in fact existed?

LIST OF PARTIES

Respondents accept the list of parties provided by petitioner.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(1)

The Factual Background

The plaintiff in the instant action (hereafter referred to as "petitioner")

served as Director of Operations with the respondent City's Parking Violations Bureau ("PVB") from May or June of 1980 through June 1, 1990, when he was transferred to another division within the same agency (32, 34, 47, 100, 270).[1]

During his tenure as head of the Operations Division, petitioner received generally favorable evaluations by his supervisors, except with respect to his ability to work productively with fellow executive staff (147-158). One supervisor noted on the evaluation form that "at times [petitioner's] lack of control of emotions at meetings seriously detracted from [his] otherwise professional manner" (440-441). Petitioner did not agree with this assessment

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[1] Unprefixed numbers in parentheses refer to pages in the Joint Appendix filed in the U.S. Court of Appeals for the Second Circuit. Numbers preceded by the letter "A" refer to pages in the Appendix to the instant petition.

of his behavior (441). However, when respondent McEnery became Director of the PVB in February 1988, petitioner was reporting to the agency's legal counsel because he had previously had difficulty working with other executive staff members (263).[2]

In March of 1988, petitioner wrote the first of a long series of memos, directed to

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[2] The independent report released by New York City's Department of Investigation ("DOI") in June 1991, in response to petitioner's charge that his transfer was in retaliation for his alleged whistle-blowing activities, notes evidence of "a history of conflict and disagreement between [petitioner] and virtually all other PVB managers" (216). It also details specific instances of his "divisive manner" and inability to work constructively with his peers (230-233). Further instances of petitioner's disruptive behavior were provided by one of his former colleagues at the hearing held by the District Court on the motion at issue here. She described discussions of issues at staff meetings degenerating into personal attacks by petitioner on staff disagreeing with his views and was of the opinion that petitioner's presence made it impossible to conduct any agency business (460-465).

his colleagues and superiors, whose critical content petitioner claims resulted in his removal as Director of Operations (11-14, 136). These memos covered topics as diverse as the agency's use of a highly complex, recently installed computer system (35-37, 219-220); its policies on refunds (37, 60, 223); its procedures for enforcing judgments (38-39); and the content of a collection letter (40-41).

By the fall of 1989, petitioner, who is not a lawyer, had turned his attention to a legal matter, disagreeing with the agency's interpretation of a state court decision (41, 85-86, 221). He could not be persuaded that there was another, valid point of view, even after respondent McEnery consulted with the City's Corporation Counsel and the Corporation Counsel's office issued a formal opinion validating the agency's position (42, 43, 44, 88-90, 221-222, 264-265, 268). All of petitioner's complaints were reiterated on

a regular basis at executive staff meetings (39, 41, 221-222).

By mid-1989, respondent McEnery had become concerned with what he characterized as petitioner's "increasingly negative attitude, confrontational style, difficulty in getting along with peers and supervisors, and preoccupation with a limited number of issues" (266-267). Petitioner habitually insulted and belittled other staff members at executive meetings, meetings which respondent McEnery had been required to interrupt "more than once" to defuse angry confrontations initiated by petitioner (266).

Petitioner had also become "preoccupied with his criticisms, using every staff meeting as a forum for airing his views," thus making it "more and more difficult to address other issues" when petitioner was present (266). In addition, respondent McEnery believed that petitioner had become "rigid and isolated" as Director of the Operations

Division, resisting efforts by the Director and Deputy Director of the agency to obtain information about the operation of petitioner's division and making it difficult for them to supervise and coordinate effectively (267).[3]

Respondent McEnery presented the idea of transferring petitioner to the Commissioner of DOT at the end of 1989, and he then discussed it with the new Commissioner, respondent Riccio, when he

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[3] The June 1991 DOI report contains evidence of similar assessments from other sources (231-233). In a March 1989 memorandum, petitioner's immediate supervisor described his inability to take direction and constructive criticism, noting that petitioner's "perception that no other PVB employees were interested in serving the public was insulting and a disservice to his colleagues" (231). Eight months later the same supervisor, in a memorandum dated November 15, 1989, reminded respondent McEnery of earlier discussions concerning petitioner's "divisive behavior" and "defiance of all direction," urging respondent McEnery to discuss petitioner's reassignment within the Department of Transportation ("DOT") with senior DOT managers (232-233).

assumed charge of the agency in early 1990 (268, 471). In the meantime, in response to a series of audit reports issued in late 1989 and early 1990 by the State Comptroller's Office calling for additional quality controls at PVB, the agency had decided to create the new position of Director of Quality Control and Project Implementation (267). Respondent McEnery did not initially have petitioner in mind for this slot, but, after the decision to transfer him had been made, respondent McEnery believed that the position's "watchdog and public information functions" would provide a constructive outlet for petitioner's energies (233, 268, 470). Accordingly, on April 4, 1990, after obtaining the Commissioner's approval, defendant McEnery began drafting a memo to the staff announcing creation of the new directorship, petitioner's appointment to the position, and other proposed agency changes (268, 310-311, 470).

Some six weeks later, on May 14, 1990, petitioner and defendant McEnery attended a dinner hosted by the Association of PVB Administrative Law Judges at which petitioner received the Association's "Administrator of the Year Award" (44, 268-269). In a speech to the members, all of whom were employed at PVB and with many of whom petitioner had long-standing and close relationships (269), petitioner again voiced his views on the legal matter addressed in the Corporation Counsel's opinion (44). He also charged that PVB interfered with the ability of the ALJ's to be fair and impartial (44).

According to petitioner, this was his "first public statement regarding PVB's illegal and unethical policies and practices," and respondent McEnery allegedly "expressed his dissatisfaction" with petitioner's remarks (44). Respondent McEnery recalled that petitioner had expressed "the same criticisms

he had voiced over and over again in the past," but respondent McEnery did not remember "expressing dissatisfaction" and saw nothing particularly significant in the fact that petitioner had chosen to air his views to a group of PVB administrative law judges (268-269).

On May 24, 1990, approximately seven weeks after the transfer decision had been made and ten days after the administrative law judges' dinner, respondent McEnery informed petitioner that he intended to move him to the newly-created position of Director of Quality Control and Project Implementation, where petitioner would be at a comparable managerial level and receive the same salary (269). Petitioner rejected the offer of the new directorship outright on the ground that it was not comparable to his former position, and because respondent McEnery allegedly refused to describe or

document the position's scope and responsibilities (44-46, 233-234, 269).

On the following day, May 25, 1990, respondent McEnery asked petitioner, in a written memo, to reconsider the transfer. He also informed him that, if he still rejected the offer, petitioner would nevertheless be removed as Director of Operations, effective June 1, 1990 (47, 98, 136, 270).

The removal was confirmed by memorandum dated May 30, 1990 and petitioner was reassigned, at the same salary, to the DOT General Counsel's office (47, 100, 270). According to petitioner, he was given no responsibilities after his transfer and spent ninety percent of his time during the twelve months prior to commencement of the instant action doing absolutely nothing (48).

Upon receipt of respondent McEnery's May 30, 1990 removal memorandum, petitioner immediately contacted New York City Council

President Andrew Stein (47). In response, Council President Stein contacted the defendant DOT Commissioner (47, 102-103). He also requested that the City's independent Department of Investigation ("DOI") look into the circumstances surrounding petitioner's transfer and his allegation that he had been demoted for "whistle-blowing" activities (48, 214).

The DOI began an investigation in July of 1990, interviewing petitioner on July 20 and July 23 (48-49, 214). A DOI investigator allegedly informed petitioner that he could expect a report of the results by the end of September 1990 (49). However, DOI ultimately found it necessary to conduct 23 depositions and interviews with 21 PVB and DOT managers, including petitioner, and to review agency records over a five-year period (215). Its final report was not issued until nine months later, on June 11, 1991 (214-235).

After a detailed discussion of petitioner's various charges, the DOI report concluded that he had not been retaliated against for "whistle-blowing" activities, in contravention of the applicable statutes (230-234). Instead (234),

> . . . the evidence demonstrates that the disagreement between [petitioner] and PVB managers led to a lack of mutual respect, civility and a shared common agreement on the purpose and functions of PVB. For this reason, the PVB Director and Deputy Director decided to remove [petitioner] as Director of Operations, where he had substantial authority over PVB's management, and place him in a position where he had authority to comment and advise but not to direct PVB's operations.

Notwithstanding this assessment of petitioner's claim, DOI noted that petitioner's suggestions had often in fact been adopted by management (218), and it judged that "it would be unfortunate if [petitioner's] services, experience, and talents were to be lost" (234). However, the DOI also recognized that "it would be unwise to force

PVB senior managers to work with a person whom they perceive to have little respect for them or their efforts" (234), and it recommended that a managerial position be found for petitioner outside of PVB (235).[4]

(2)

Petitioner's Legal Challenge

On or about May 22, 1991, petitioner filed a complaint in the United States District Court for the Southern District of New York alleging, inter alia, that 42 U.S.C. § 1983 had been violated (1) by respondents' removal of petitioner from his managerial

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[4] In July or August of 1990, respondents had in fact informed petitioner of an opening as fiscal officer at the New York City Department of Records and Information Services, but petitioner declined to interview for the position (138-139). In June 1991, petitioner again refused to be interviewed for two positions within DOT because they were classified at a slightly lower managerial level than his former position and petitioner believed the jobs were therefore "not responsive to my legal claims" (139-140, 434-436, 450-451).

position at PVB on or about May 24, 1990, a year earlier; (2) by their transfer of petitioner to another division, at the same salary but without managerial responsibilities; and (3) by their failure to offer him an equivalent managerial position (1-18). According to petitioner these actions were undertaken in retaliation for the exercise of his First Amendment right to comment on certain PVB policies and practices which he considered illegal and unethical (7, 11, 15-17).[5]

The complaint itself sought both preliminary and permanent injunctive relief, in addition to declaratory relief and damages (15-18). The complaint's request for interim relief was duplicated in the simultaneously filed motion at issue here (28-29, 487).

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[5] The complaint also alleged due process and equal protection violations and set forth several pendent state claims not at issue on this appeal (11-15).

A hearing on petitioner's motion seeking reinstatement to his former position, pending trial of the underlying issues, was held on July 11, 1991 (374-482). Petitioner's request for interim relief was denied by an Order and Opinion of the United States District Court for the Southern District of New York (Leisure, D.C.J.), dated July 16, 1991 (A8-A36).

By order entered October 22, 1991, the United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's order (A1-A6). On December 19, 1991, the same Court denied petitioner's request for a rehearing (A37-A38).

(3)

Opinion of the District Court

In an opinion reported at 767 F.Supp. 72, the District Court briefly reviewed the factual background and contentions of the parties before discussing the applicable legal

principles (A9-A20). Citing to relevant authority, the Court noted that, in the Second Circuit, the threshold inquiry is whether the applicant for a preliminary injunction has demonstrated that he or she is likely to suffer irreparable harm if equitable relief is denied (A20-A23). Only where a sufficient showing on this issue has been made is it necessary to consider whether the moving party has also established either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor (A20-A22).

With respect to irreparable injury in cases alleging retaliatory action for the exercise of First Amendment rights in an employment situation, the District Court found two of the Second Circuit's recent decisions controlling, American Postal Workers Union v. United States Postal

Service, 766 F.2d 715 (2nd Cir., 1985), cert. denied, 475 U.S. 1046 (1986), and Savage v. Gorski, 850 F.2d 64 (2nd Cir., 1988) (A23-A30). American Postal Workers held that, although a chilling of First Amendment rights might, in certain circumstances, constitute irreparable injury, the plaintiff therein had not established the existence of a chilling effect on union activity by virtue of failure to reinstate the union's president pending an arbitrator's decision concerning the legality of his termination. The Court reasoned that the source of any alleged chill had to be the threat of permanent discharge and that such a threat could not be eliminated by an interim injunction (A23-A30). This holding was reiterated three years later in Savage v. Gorski, where the Second Circuit also noted that, because reinstatement and money damages could make whole any government employee allegedly dismissed for the First

Amendment exercise of political beliefs, the injury was "plainly reparable" (A28).

The District Court failed to find any basis on which American Postal Workers and Savage v. Gorski could be distinguished from the case at bar--particularly in light of petitioner's concession that his own First Amendment rights had not in fact been chilled either before or since his transfer, and given what the Court described as the "unpersuasive" and only marginally relevant evidence of the transfer's chilling effect on other PVB employees (A29-A30).[6] It

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[6] This evidence consisted of (1) a "declaration" by an attorney associated with petitioner's counsel summarizing the content of eight sworn affidavits purportedly establishing that the affiants were reluctant to report illegal agency activity because of petitioner's removal (245-248); and (2) testimony by an administrative law judge employed by PVB stating, inter alia, that he was concerned about possible "negative" consequences flowing from his appearance at the hearing on petitioner's motion (A30, n.7; 403). There was no indication in either

(Footnote Continued)

rejected petitioner's "direct violation" theory, recognizing but declining the invitation to rule that the effects of a past First Amendment violation must be presumed to continue and therefore any alleged infringement of First Amendment rights constitutes irreparable injury per se (A31-A32). The District Court pointed out that all of the Second Circuit cases relied on by petitioner in support of this theory involved, not dismissals from employment, but the application or enforcement of statutes and rules regulating conduct (A31, A32).

Finally, the Court noted that what it termed a "related consideration," i.e., petitioner's year-long delay in seeking

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(Footnote Continued)
source that petitioner's reinstatement on a temporary basis would relieve the alleged chill, and, as the Court specifically noted, the ALJ did not state that his concern "was in any manner connected to [petitioner's] transfer" (A30, n.7).

injunctive relief, argued against the need for drastic action to remedy an irreparable injury (A32-A35). Since petitioner had failed to make the requisite threshold showing of harm necessary to justify issuance of injunctive relief, the Court denied the motion without assessing petitioner's likelihood of success on his underlying claims (A35-A36).

(4)

Opinion of the Court of Appeals

In its unpublished summary order, reported at 948 F.2d 1278, the United States Court of Appeals for the Second Circuit noted, first, that its review of the district court's refusal to grant interim injunctive relief was limited to a determination of whether there had been an abuse of discretion in the lower court's application of the governing principles (A2-A3). It could find no such abuse here.

With respect to the question of irreparable injury, the Court observed that loss of employment does not fall into that category, citing Sampson v. Murray, 415 U.S. 61, 91-92 (1974) (A4). While recognizing that "interference with First Amendment rights may constitute irreparable harm" (A4), the Court found that principle inapplicable here because (1) petitioner had not altered his speech to retain his position; and (2) he had conceded that respondents had not infringed his First Amendment rights since the transfer (A4). Under such circumstances, the Court concluded that Elrod v. Burns, 427 U.S. 347 (1976), was not controlling, and held, as it had in Savage v. Gorski and American Postal Workers Union v. U.S. Postal Service, supra, that reinstatement with back pay, without injunctive relief, could adequately compensate petitioner (A4).

Nor could the Court find any abuse of discretion in the district court's refusal to consider petitioner's evidence of a chilling effect on the speech of his fellow employees (A4). It pointed out, as it had in both Savage v. Gorski, supra, 850 F.2d at 67-68, and American Postal Workers, supra, 766 F.2d at 722, that, because permanent transfer was the real source of any purported chill, temporarily returning petitioner to his job pending resolution of the case would not abate that effect (A4-A5). The Court then further held that Sampson, supra, disposed of the argument that damage to petitioner's self-esteem flowing from the allegedly menial nature of his current assignments constituted continuing punishment for the prior exercise of his First Amendment rights (A5).

Finally, the Court upheld the district court's consideration of petitioner's long delay in seeking interim relief as a factor

bearing on the existence vel non of irreparable injury (A6). It pointed out that petitioner's exhaustion argument did not require a different conclusion, since the relevant exhaustion statute -- New York City's so-called "Whistleblower Law," Admin. Code § 12-113 (A40-A43) -- does not in any way limit an employee's right to seek judicial review of a personnel decision and, in fact, the instant action was commenced before the investigatory procedures provided for in the Code had been completed (A6).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Second Circuit properly rejected petitioner's argument that a personnel action allegedly taken in response to a public employee's criticism of his employer's policies or practices constitutes irreparable injury per se, thereby automatically requiring reinstatement to his prior position pending trial of the underlying issues. This

conclusion is not in conflict with this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976), which not only pertained solely to political speech, but limited its discussion of "irreparable injury" to situations in which a First Amendment violation was either threatened or ongoing, in the sense that it had in fact caused an employee to change his political allegiance in order to retain his job.

Nor is it in conflict with Rutan v. Republican Party, 497 U.S. 62, 110 S.Ct. 2729 (1990), which was similarly limited to a discussion of the First Amendment right to freedom of political association. In addition, since Rutan involved a motion to dismiss and does not address the question of irreparable injury, its discussion of the presumed chilling effect of personnel decisions based on patronage is irrelevant where, as here, patronage is not at issue and the complaining party concedes that his transfer from one government position to another did not cause

him to cease criticizing agency policies and procedures.

For the same reasons, there is no conflict between the Second Circuit's determination that interim relief was appropriately denied by the district court and various determinations by other Circuit Courts of Appeal concerning the propriety of such relief where political speech is at issue, or where the context concerns reappointment of a prisoner as an advisor to other inmates.

Finally, what petitioner defines as a standing problem reduces to the question of whether the district court properly declined to consider affidavits concerning the alleged chilling effect on petitioner's fellow employees resulting from his transfer. This determination was based not only on the questionable evidentiary value of the affidavits, but on the conclusion that, even if such chill in fact existed, its source was the threat of permanent transfer; this threat

could not be abated by temporary reinstatement; and there was no indication that the proferred affidavits could establish the contrary.

REASONS FOR DENYING THE WRIT

POINT I

WHERE A PUBLIC EMPLOYEE CLAIMS THAT HE HAS BEEN TRANSFERRED BECAUSE HE CRITICIZED CERTAIN AGENCY POLICIES AND PROCEDURES, BUT WHERE HE ALSO CONCEDES THAT HIS FIRST AMENDMENT RIGHT TO ARTICULATE SUCH CRITICISMS HAS IN NO WAY BEEN INTERFERED WITH BY THE TRANSFER, IT IS NOT AN ABUSE OF DISCRETION TO REFUSE TO REINSTATE THE EMPLOYEE TO HIS FORMER POSITION PENDING TRIAL. UNDER SUCH CIRCUMSTANCES, THERE IS NO "IRREPARABLE INJURY", CAPABLE OF BEING ABATED BY REINSTATEMENT, AND THE DECISION OF THE COURT OF APPEALS TO THAT EFFECT IS FULLY IN ACCORD WITH ALL APPLICABLE AUTHORITIES.

(1)

There is no Conflict With Prior Decisions of this Court.

As this Court has noted, "[t]he traditional standard for granting a

preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (emphasis added). Accord, Brown v. Chote, 411 U.S. 452, 456 (1973).

Petitioner proposes that this Court review the instant case because the Second Circuit did not see fit to apply a standard from which either the "irreparable injury" requirement of Doran v. Salem Inn had been completely eliminated, or to which a proviso had been added stating that the standard applies "except where there is an allegation that a government employee's First Amendment right to comment on the policies and practices of his employer has been violated in the past, in which case the past violation will be considered irreparable injury even though injunctive relief cannot, by definition, prevent it."

In support of this proposition, petitioner posits a conflict between the result reached by the Court of Appeals here and this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976), and in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729 (1990).[7] No such conflict exists.

We note, first, that petitioner is forced to adopt this position because he has conceded that the act of transferring him to another position within the agency did not prevent him from articulating his criticisms of PVB, and that he has not been prevented from doing so since. It is this fact which is at the heart of his attempt to read into Elrod and Rutan the theory that irreparable injury

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[7] Rutan, on which petitioner focuses in the instant petition, is not cited at all in his original brief to the Second Circuit, suddenly assuming importance only in petitioner's request for reargument or a rehearing en banc.

may be established by the mere allegation of a past First Amendment violation.

In support of this proposition, petitioner observes that three of the plaintiffs in Elrod had been discharged for refusal to change their political affiliations. He then quotes a passage which not only makes no reference to this category of plaintiffs, but is directly preceded by two sentences in which mention of their status is conspicuously missing. See, Petition at p. 21. The omitted introductory part of the quotation in question reads as follows (Elrod, supra, 427 U.S. at 373):

> At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic party in order to avoid discharge.

This is directly followed by the language on which petitioner relies (id.) (emphasis added):

> It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

To support petitioner's theory, the omitted introductory sentences must be disregarded; the "therefore" must be eliminated from the first sentence of the passage on which petitioner relies; and the sentence immediately following must be rewritten to refer not just to rights which "were either threatened or in fact being impaired," but to rights which had been so impaired in the past. That this degree of semantic manipulation was not intended, however, is emphasized by the citation to New York Times Co. v. United States, 403 U.S. 713 (1971), which immediately follows

(and which is also omitted by petitioner). That case concerned not a past violation, but an ongoing situation of prior restraint.[8]

In other words, in holding that Elrod was not relevant because the instant petitioner had not altered his speech to retain his position, the Second Circuit was referring directly to the mention of the respondents in Elrod who had changed their party allegiances in order not to lose their jobs. It is petitioner's statement that "[n]othing in Elrod suggests that the plaintiffs suffered any additional injuries

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[8] The Elrod Court then concludes that the Court of Appeals could properly have found that the district court abused its discretion in refusing interim relief, "[s]ince such injury was both threatened and occurring" at the time the motion was made, id. at 374, not "since such injury was threatened, had occurred, and was occurring." Again, the citation which follows this passage, Bantam Books v. Sullivan, 372 U.S. 58, 67 (1963), refers to a case in which preliminary injunctive relief was issued in response to a threat of future action, not past violation.

cognizable under the First Amendment by, for example, changing their political parties," Petition at p. 23, which is flatly contradicted by the text, since the dismissed plaintiffs to whom petitioner refers are not mentioned in the category of plaintiffs to which the Court's reasoning applies. See, Shondel v. McDermott, 775 F.2d 859, 867 (7th Cir., 1985) (noting that Elrod does not discuss reinstatement).

Secondly, petitioner's insistence that there is a conflict with Rutan v. Republican Party is, if possible, a position even less tenable than his assertion that the Second Circuit's holding conflicts with Elrod. Petitioner correctly notes that Rutan does not comment on the "irreparable injury" standard. Petition at p. 22, n.*. Despite this recognition, he then incorrectly reasons that Rutan's discussion of the presumed chilling effects of patronage dismissals applies (1) in a situation where any such

presumption has been overcome by petitioner's concession that his own First Amendment rights were never chilled; and (2) where the rights involved have nothing to do with an individual's personal choice of political affiliation.

Indeed, both Elrod and Rutan stand for the principle that, except in the case of high-level public employees whose political affiliation may well be a matter of legitimate concern, government personnel decisions can not be made on the basis of an employee's political affiliation. The same proposition has not, however, been extended to a public employee's right to comment on the policies and practices of his or her employer.

To the contrary, a series of decisions by this Court has established that an employee's First Amendment right to speak out on such matters is not absolute. Connick v. Myers, 461 U.S. 138 (1982); Givhan v. Western Line Consolidated School

District, 439 U.S. 410 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968). See also, Rankin v. McPherson, 483 U.S. 378 (1987). More specifically, speech by public employees which touches on matters of public concern is protected only to the extent that the employee's interest, as citizen, in commenting on such matters outweighs the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. See, Pickering, supra, 391 U.S. at 568, 574; Connick, supra, 461 U.S. at 142.

In other words, whatever preeminence Elrod and Rutan may have given to political speech in the government workplace by holding that patronage is not the least restrictive means for fostering a public employer's legitimate interests, Rutan,

supra, 110 S.Ct. at 2734, the same weight has not been given to speech relating to the policies and practices of a government agency. To the extent that this fact may bear on the question of "irreparable injury," Elrod and Rutan are clearly inapplicable to the case at bar, and the Court of Appeals correctly so held.

(2)

The Decisions of Other Circuit Courts of Appeals on Matters Relating to Political Affiliation or Prison Assignments Do Not Conflict with the Second Circuit's Opinion in the Case at Bar.

In support of the instant petition, petitioner discusses four cases which he maintains came to a result different than that reached by the Court of Appeals herein. Not only is this a function of the fact, noted in the brief submitted by respondents to the Court of Appeals, that the various Circuits have slightly differing standards governing issuance of preliminary injunctions, but three of the four cases involved exercise of

the personal right to freedom of political belief and association. Romero Feliciano v. Torres Gaztambide, 836 F.2d 1 (1st Cir., 1987); Perry v. Local Lodge 2569, 708 F.2d 1258 (7th Cir., 1983); Johnson v. Bergland, 586 F.2d 993 (4th Cir., 1978). They are thus readily distinguishable on that ground. See, discussion in subsection (1), supra. Furthermore, none concerned a situation in which the employee in question conceded that his First Amendment rights had not been chilled.[9]

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[9] In fact, the First Circuit's decision in Romero Feliciano, supra, premises issuance of preliminary injunctive relief specifically on the chilling effect of the plaintiff's termination on the exercise of associational rights, 836 F.2d at 4, a chilling effect which, as discussed above, is not present here. Contrary to petitioner's assertion, the First Circuit has also made clear that, particularly in cases not involving political expression, this is indeed a crucial factor in establishing irreparable injury. See, e.g., McDonough v. Trustees of the University System of New Hampshire, 704 F.2d 780, 784, n.2 (1st Cir., 1983); Maceira v. Pagan,
(Footnote Continued)

The fourth case on which petitioner relies, Newsom v. Norris, 888 F.2d 371 (6th Cir., 1989), involved not personnel actions allegedly undertaken in response to an employee's criticisms of agency policies or practices, but failure to reappoint prisoners to advisory positions because of their complaints about the conduct of the chairman of a disciplinary board. These facts alone would distinguish Newsom from the case at bar, but it is also significant that, in Newsom, there were extensive evidentiary findings establishing the fact of retaliation.

That is not the situation here, and this completely undercuts petitioner's thesis. His position appears to reduce to the idea that, prior to a full trial on the merits of a claim of retaliation for the exercise of an

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(Footnote Continued)
649 F.2d 8, 18 (1st Cir., 1981). There is thus patently no conflict between the First and Second Circuits.

individual's First Amendment right to criticize the policies of his public employer, the allegation of a constitutional violation is sufficient to require immediate reinstatement. We respectfully submit that the Sixth Circuit, in the context of a prison case, did not reach this conclusion, and its dicta concerning infringements of First Amendment rights do not establish a conflict with the decision of the Second Circuit in the case at bar sufficient to merit review by this Court.[10]

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[10] Respondents have not been able to locate any other case, even within the Sixth Circuit itself, which has used Newsom to support an argument similar to petitioner's. As of this writing, the case has only been cited three times, in support of unrelated propositions.

POINT II

THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT CONSIDERING AFFIDAVITS, OF QUESTIONABLE EVIDENTIARY VALUE, ALLEGEDLY ESTABLISHING THAT PETITIONER'S TRANSFER HAD CHILLED HIS FELLOW EMPLOYEES IN THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Petitioner claims that an erroneous ruling with respect to his standing to assert the alleged chilling effect of his transfer on his fellow employees motivated the district court to refuse to consider the anonymous affidavits which he produced to support this alleged "chill." Standing is a non-issue.

The district court refused to consider this material (1) because of its questionable evidentiary value; and (2) because, as discussed in American Postal Workers and Savage v. Gorski, supra, even if this "chill" existed, there was no evidence that it would be remedied by petitioner's temporary reinstatement to his former position. Since

petitioner does not even challenge the logic of this reasoning, much less demonstrate that it conflicts with prior decisions of this Court or of the other Circuit Courts of Appeal, there are no grounds supporting any need for review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 20, 1992

Respectfully submitted,

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